APPELLANT PRO SE:

**BRIAN K. LONNEMAN**
Terre Haute, Indiana

ATTORNEY FOR APPELLEE:

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# IN THE
# COURT OF APPEALS OF INDIANA

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| BRIAN K. LONNEMAN, | ) | |
| | ) | |
| Appellant-Petitioner, | ) | |
| | ) | |
| vs. | ) | No. 84A04-0610-CV-585 |
| | ) | |
| CAROLE A. LONNEMAN, | ) | |
| | ) | |
| Appellee-Respondent. | ) | |

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable Phillip I. Adler, Judge
Cause No. 84D02-0508-DR-6824

**April 24, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAKER, Chief Judge**

Appellant-petitioner Brian K. Lonneman appeals from the trial court's decree of dissolution of the marriage of Brian and appellee-respondent Carole A. Lonneman. Specifically, Brian argues that the trial court erred by (1) granting custody of the couple's two children to Carole because there was no evidence that Brian was an unfit parent, (2) awarding $20,000 to Gerald and Ruth Schaefer (collectively, the Schaefers), (3) vacating a previous order granting Brian's change of judge motion, (4) denying Brian's motion for a new trial, and (5) denying Brian's motion to disqualify Paula J. Schaefer (Paula)[1] from representing Carole after the dissolution hearing. Finding no error, we affirm the judgment of the trial court.

## FACTS[2]

Brian and Carole were married on July 19, 1997. The couple had two children—S.L., born on June 21, 2000, and K.L., born on May 13, 2003. On August 9, 2005, Brian filed a petition for dissolution of marriage, and the trial court held a preliminary hearing on October 19, 2005. The trial court held a final dissolution hearing on July 6, 2006. On July 10, 2006, the trial court entered an order dissolving Brian and Carole's marriage and, among other things, granting primary physical and legal custody of S.L. and K.L. to Carole and ordering Brian to make child support payments in the amount of $138 per week. In addition, the trial

[1] Paula is Carole's sister. We refer to Paula by her first name to avoid any confusion with the Schaefers—Paula and Carole's parents—who are indirectly involved in this case.

[2] It is well settled that the statement of facts is to be in a narrative form and not argumentative. Parks v. Madison County, 783 N.E.2d 711, 717 (Ind. Ct. App. 2002). On January 18, 2007, Carole filed a motion to strike portions of Brian's brief, contending that the statement of facts contained in his brief was argumentative and that we should strike the argumentative portions of the statement of facts as well as related portions in the summary of the argument. After concluding that portions of Brian's statement of facts are

court provided that

> [o]ne of the most contentious issues before the Court, other than custody, is the payment of twenty thousand dollars to the parties by [Carole's] parents, [the Schaefers]. [Brian] insists that this money, which was given on or about March 28, 1997, was a gift, and [Carole] claims that it was a loan. . . . [T]he Court finds there is substantial evidence that clearly suggests that the twenty thousand dollar payment made to [Brian and Carole] was indeed a loan. From the net proceeds of the sale of the marital residence, which is now being held in escrow, twenty-three thousand, eight hundred and five dollars ($23,805.00) shall be paid to Mr. and Mrs. Schaeffer [sic], which represents the repayment of said loan.

Appellant's App. p. 27.

On August 9, 2006, Brian filed a motion to correct error.[3] On August 15, 2006, Paula entered her appearance as counsel for Carole. On August 17, 2006, Brian filed his motion for an automatic change of judge, which the trial court granted the same day. On August 22, 2006, Carole filed a motion to vacate the trial court's order granting Brian's motion for an automatic change of judge. On September 19, 2006, the trial court granted Carole's motion to vacate and denied Brian's motion to correct error.

On September 21, 2006, Brian filed a motion to disqualify Paula and a motion for a new trial, arguing that Paula had perjured herself when she testified at the dissolution hearing and that she could not represent Carole without violating the Indiana Rules of Professional Conduct. On September 26, 2006, the trial court denied Brian's motion to disqualify and his motion for a new trial. Brian now appeals.

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indeed argumentative, we grant Carole's motion in part to strike the arguments contained in the statement of facts but deny Carole's request to strike related portions of the summary of the argument.

[3] Both parties were represented by counsel at the final dissolution hearing; however, Brian has represented himself pro se since filing the motion to correct error.

## DISCUSSION AND DECISION

### I. Custody of S.L. and K.L.

Brian argues that the trial court erred when it awarded custody of S.L. and K.L. to Carole. Specifically, Brian argues that "a trial court may only take away the pre-existing child custody of a natural parent when serious unfitness is proven . . . [and] that Brian was never even alleged unfit to parent his two minor children." Appellant's Br. p. 9.

Child custody determinations fall squarely within the discretion of the trial court and will not be disturbed absent an abuse of discretion. Clark v. Clark, 726 N.E.2d 854, 856 (Ind. Ct. App. 2000). Reversal is appropriate only if we determine that the trial court's decision is against the logic and effect of the facts and circumstances before it or the reasonable inferences that can be drawn therefrom. Id.

It is well settled that when making a custody determination, the trial court's primary consideration is the best interests of the child. Naggatz v. Beckwith, 809 N.E.2d 899, 902 (Ind. Ct. App. 2004). Indiana Code section 31-14-13-2 provides:

> In determining the child's best interests, there is not a presumption favoring either parent. The court shall consider all relevant factors, including the following:
>
> (1) The age and sex of the child.
>
> (2) The wishes of the child's parents.
>
> (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
>
> (4) The interaction and interrelationship of the child with:
>
> (A) the child's parents;
> (B) the child's siblings; and
> (C) any other person who may significantly affect the child's

best interest.

(5) The child's adjustment to home, school, and community.

(6) The mental and physical health of all individuals involved.

(7) Evidence of a pattern of domestic or family violence by either parent.

(8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 2.5(b) of this chapter.

When making the child custody determination here, the trial court provided that

> [f]ortunately, in this case, the Court is presented with two good parents. Both [Brian and Carole] are good care givers [sic], affectionate, vigilant, and have their children's best interests at heart. The decision in this case is not easy and it is a close call; however, the Court finds, considering all the facts and evidence presented, and all factors involved, that it is in the children's best interests that they be placed in the physical custody of [Carole].

Appellant's App. p. 28. While Brian argues that the trial court erred because there was no evidence that he was an unfit parent, the standard that Brian presents is contrary to well-settled law.[4] As noted above, the trial court's primary consideration when making a child custody determination is the best interests of the child. Naggatz, 809 N.E.2d at 902. Contrary to Brian's assertion, it was not necessary for the trial court to determine that Brian was an unfit parent before awarding custody of the couple's two children to Carole.

Turning to the substance of the trial court's determination, we note that Brian has

[4] Brian cites various cases that he claims support his argument; however, those cases do not involve child custody determinations and, thus, are not instructive. See, e.g., Troxel v. Granville, 527 U.S. 1069 (1999) (grandparent visitation); Santosky v. Kramer, 455 U.S. 745, 759 (1982) (involuntary termination of parental rights).

failed to include a transcript of the dissolution hearing in the record on appeal.[5] The burden is on the appellant to provide us with a sufficient record that we can review for trial court error. Lenhardt Tool & Die Co., Inc. v. Lumpe, 703 N.E.2d 1079, 1084 (Ind. Ct. App. 1998). After the dissolution hearing, the trial court concluded that it was presented with "two good parents . . . [who both] have their children's best interests at heart[; however,] considering all the facts and evidence presented, and all factors involved, that it is in the children's best interests that they be placed in the physical custody of [Carole]." Appellant's App. p. 28. In light of its finding that "father is a good parent," the trial court ordered that "the Court is going to extend parenting time which should benefit not only [Brian], but also his two daughters." Id. Because we are unable to review the evidence presented at the hearing, we cannot conclude that the trial court abused its discretion when it granted custody of S.L. and K.L. to Carole.[6]

## II. Marital Debt

Brian argues that the trial court erred when it awarded the Schaefers $23,805. Specifically, Brian argues that the trial court erroneously classified the money as a loan and that the trial court should not have awarded the Schaefers money because they were not a party to the dissolution action.

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[5] On October 11, 2006, the trial court reporter sent a letter to Brian confirming that she correctly understood that he was "requesting zero transcripts be prepared for the appeal in this matter[.]" Appellee's App. p. 1. Brian responded six days later that she was "correct." Id. at 2.

[6] Brian also challenges the trial court's child support award, arguing that "no order for child support can lawfully exist against a natural parent whose existing custody was removed without the required clear and convincing finding of unfitness." Appellant's Br. p. 15. Because Brian's contention regarding the child support award is based on a proposition that we have already rejected, we need not address that argument further.

The division of marital property in Indiana is a two-step process. Thompson v. Thompson, 811 N.E.2d 888, 912 (Ind. Ct. App. 2004). The trial court must first determine what property must be included in the marital estate. Id. Marital property includes both assets and liabilities. Gard v. Gard, 825 N.E.2d 907, 910 (Ind. Ct. App. 2005). Thus, "[i]n making a division of marital property, the court properly considers the separate property rights of the parties as well as all debts of the parties." Id. "Generally, the marital estate closes on the date the dissolution petition was filed, and debts incurred by one party after that point are not to be included in the marital estate." McCord v. McCord, 852 N.E.2d 35, 45 (Ind. Ct. App. 2006).

After determining what constitutes marital property, the trial court must then divide the marital property under the presumption that an equal split is just and reasonable. Ind. Code § 31-15-7-5. If the trial court deviates from this presumption, it must state why it did so. Thompson, 811 N.E.2d at 913. A party who challenges the trial court's division of the marital estate must overcome a strong presumption that the court considered and complied with the applicable statute. Frazier v. Frazier, 737 N.E.2d 1220, 1223 (Ind. Ct. App. 2000).

The division and disposition of marital assets is entrusted to the sound discretion of the trial court and we will reverse only upon an abuse of that discretion. Eye v. Eye, 849 N.E.2d 698, 701 (Ind. Ct. App. 2006). We will neither reweigh the evidence nor judge the credibility of witnesses and will consider only the evidence most favorable to the trial court's disposition of the property. Id. Although a different conclusion might be reached in light of the facts and circumstances, we will not substitute our judgment for that of the trial court. Id. An abuse of discretion occurs if the trial court's decision is clearly against the logic and

effect of the facts and circumstances before it or if the trial court has misinterpreted the law or disregards evidence of factors listed in the controlling statute. Id.

Brian first argues that it was improper for the trial court to award the Schaefers $23,805 because they were not parties to the dissolution action. However, neither case law nor statutory authority supports Brian's argument. As we have previously held:

> The [dissolution of marriage] act contemplates that the parties thereto are the parties to the marriage. The issues to be litigated are the grounds, child custody and support, the disposition of the property of the parties and, pending litigation, the matters necessary to an orderly determination of those issues. . . . Neither the rules of trial procedure nor the dissolution of marriage statutes are so broad as to require third parties to be dragged into marriage dissolution proceedings by their heels and there compelled to litigate issues that are but tangential to that cause of action.

Gaw v. Gaw, 822 N.E.2d 188, 191 (Ind. Ct. App. 2005). Therefore, the trial court did not err by awarding money to the Schaefers because they were appropriately not parties to the dissolution action.

Brian next argues that the trial court erroneously determined that the $20,000 that the Schaefers gave to Brian and Carole was a loan. We again point out that we do not have the transcript from the hearing; however, the trial court commented in the dissolution decree that "[Carole's] father, Mr. Schaefer, testified. The Court found him to be honest, truthful, and credible. Furthermore, the Court finds there is substantial evidence that clearly suggests that the twenty thousand dollar payment made to [Brian and Carole] was indeed a loan." Appellant's App. p. 27. Carole draws our attention to a promissory note that Brian and Carole signed on March 28, 1997, which provides that the couple would pay the Schaefers $20,000 "on demand" and that interest would accrue "after demand until paid." Id. at 25.

Brian directs us to a "Gift Letter" signed by Ruth Schaefer on February 27, 1997, which states that the $20,000 was a "bona fide gift" with "no obligation, expressed or implied, to repay this sum at any time." Id. at 24.

While the trial court's comments prove that Mr. Schaefer testified at the hearing—testimony that we are unable to review because it is not in the record—we are unsure what other evidence the parties presented to the trial court regarding this issue.[7] Therefore, we cannot conclude that the trial court abused its discretion when it determined that the $20,000 was a loan.

As noted above, marital property includes both assets and liabilities. Gard, 825 N.E.2d 910. Therefore, it was proper for the trial court to consider the $20,000 loan marital property to be divided between Brian and Carole. Upon making this determination, the trial court ordered that "[f]rom the net proceeds of the sale of the marital residence, which is now being held in escrow, twenty-three thousand, eight hundred and five dollars ($23,805.00) shall be paid to Mr. and Mrs. Schaeffer [sic], which represents the repayment of said loan." Appellant's App. p. 27. Based upon the evidence before us, we are unable to conclude that the trial court improperly calculated the repayment of the loan.[8]

## III. Change of Judge Motion

[7] It is possible that the gift letter and/or the promissory note were not admitted as evidence. While these documents are included in Brian's appendix, there is no evidence that either document was admitted at the hearing.

[8] Brian also argues that Indiana Code section 34-11-2-9 bars the trial court from awarding the Schaefers $23,805 because that section provides that "an action upon promissory notes . . . must be commenced within six (6) years after the cause of action accrues." However, Brian mistakenly assumes that the Schaefers' cause of action accrued on the date the promissory note was signed when, in fact, such a cause of action accrues

Brian argues that the trial court erred when it vacated its previous order granting his change of judge motion. Specifically, Brian argues that he properly moved for a change of judge pursuant to Indiana Trial Rule 76 and that the trial court erred by granting his request and subsequently vacating its order. Brian does not argue that the trial court improperly denied his motion to correct error on the merits; instead, the gravamen of Brian's argument is that the trial court's decision to vacate its order and, instead, rule on the motion to correct error, was erroneous.

Trial Rule 76 provides, in relevant part, as follows:

> In civil actions, where a change may be taken from the judge, such change shall be granted upon the filing of an unverified application or motion without specifically stating the ground therefor by a party or his attorney. Provided, however, a party shall be entitled to only one [1] change from the judge. After a final decree is entered in a dissolution of marriage case, a party may take only one change of judge in connection with petitions to modify that decree, regardless of the number of times new petitions are filed.
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> In any action except criminal no change of judge or change of venue from the county shall be granted except within the time herein provided. Any such application for change of judge (or change of venue) shall be filed not later than ten [10] days after the issues are first closed on the merits. Except: (1) in those cases where no pleading or answer may be required to be filed by the defending party to close issues (or no responsive pleading is required under a statute), each party shall have thirty [30] days from the date the same is placed and entered on the chronological case summary of the court . . . .

With regard to dissolution proceedings, we have construed Rule 76 to require a party to file a change of judge motion within thirty days of the filing of the dissolution petition or when filing a petition to modify the dissolution decree after the final hearing. Turner v. Turner,

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upon demand for repayment. Ind. Code § 26-1-3.1-118(b). Because Brian provides no evidence that the Schaefers demanded repayment, this argument must fail.

785 N.E.2d 259, 262 (Ind. Ct. App. 2003).

Here, Brian filed his petition for dissolution on August 9, 2005, and he did not file his motion to change judge until August 17, 2006. Because Brian did not file the change of judge motion within thirty days of the petition for dissolution, his only other option pursuant to Rule 76 was to file a change of judge motion when he filed a petition to modify the dissolution decree. However, while Brian's August 17, 2006, motion was titled "Verified Motion to Correct Errors; and, Verified Petition for Modification of Custody," appellant's app. p. 32, the substance of the motion was a motion to correct error. In the motion, Brian did not request the trial court to consider new evidence to modify custody; instead, he invited the trial court to reconsider its previous decision, which is tantamount to a motion to correct error. Therefore, Brian's motion to change judge was not timely pursuant to Rule 76.

We addressed a similar situation in Turner:

> Father moved to correct alleged errors in the final dissolution decree and then filed a change of judge motion in connection with his petition to modify that decree. Father's motion to correct error is not a petition to modify. His motion relates to the evidence heard at the final hearing and is ancillary to the dissolution proceeding. Had Father wanted a change of judge in connection with the dissolution hearing, he could have filed a change of judge motion within thirty days after he filed his dissolution petition. See Trial Rule 76(C)(1). Having failed to do that, his next opportunity to request a change of judge came when he filed his petition to modify. Thus, the motion to correct error remains with the judge who entered the divorce decree.

This outcome is further supported by Trial Rule 63(A), which provides, in part:

> The judge who presides at the trial of a cause or a hearing at which evidence is received shall, if available, hear motions and make all decisions and rulings required to be made by the court relating to the evidence and the conduct of the trial or hearing after the trial or hearing is concluded.

> The judge who presided at trial should rule on post-trial motions because "parties are entitled to have issues determined by the judicial entity hearing the evidence and observing the demeanor of the witnesses." Vehslage v. Rose Acre Farms, Inc., 474 N.E.2d 1029, 1033 (Ind. Ct. App. 1985). "The principal behind Trial Rule 63 is obviously that a judge who has directed a trial is, if available, the best person to rule on post-trial motions." Bailey v. Sullivan, 432 N.E.2d 75, 76 (Ind. Ct. App. 1982). "The theory underlying the Rule is that the trial judge has continuing jurisdiction as if he had been appointed special judge." Id. The judge who presided at trial is the proper person to rule on a motion to correct error if available. Id.

785 N.E.2d at 262 (some internal citations omitted).

In light of Turner, we cannot find that it was error for the trial court to vacate its motion to change judge and rule on the merits of Brian's motion to correct error. Therefore, Brian's argument fails.

## IV. Trial Rule 60(B) Motion

Brian next argues that the trial court erred when it denied his motion for a new trial. Specifically, Brian argues that "direct and material fraud upon the court had been clearly shown as being committed by the opposition[;]" therefore, the trial court should have granted a new trial pursuant to Indiana Trial Rule 60(B). Appellant's Br. p. 23.

Trial Rule 60(B) provides, in relevant part, that a trial court may relieve a party from a final judgment for fraud, misrepresentation, or other misconduct of an adverse party. When a party asserts a claim of fraud upon the court, the party must establish that an unconscionable plan or scheme was used to improperly influence the court's decision and that such acts prevented the losing party from fully and fairly presenting its case or defense. In re Adoption of Infant Female Fitz, 778 N.E.2d 432, 437 (Ind. Ct. App. 2002). To prove fraud on the court, it is not sufficient to show a possibility that the trial court was misled. Id. Instead,

there must be a showing that the trial court's decision was actually influenced. Id.

In his Rule 60(B) motion, Brian alleged that Paula "took the witness stand during the instant divorce hearing, and twice committed affirmative, intentional, willful, and knowing Perjury, constituting not only direct fraud upon the court, but also two Class D felonies." Appellant's App. p. 75. As support for his accusations, Brian attached two sworn affidavits to his motion—one executed by him and one executed by his brother, Chris Lonneman—which allege that Brian had contact with Paula's son on October 29, 2005, and that Paula wrongly testified at the dissolution hearing that Brian had not had contact with her son since his separation from Carole.

We first note that we cannot review the merits of Brian's claim because, as mentioned above, a transcript of the dissolution hearing is not included in the record on appeal. Therefore, we are not in a position to evaluate the substance of Paula's testimony in relation to the evidence presented at the dissolution hearing, and Brian has waived this argument.

Waiver notwithstanding, when denying Brian's 60(B) motion, the trial court noted that Brian "places much too much emphasis on the testimony of Paula Schaefer [at the dissolution hearing]. Had Paula Schaefer not testified at the hearing the court would have ruled exactly the same way . . . . [T]he Court is confident that the Court's ruling would be identical." Id. at 83. In light of this remark, the trial court clearly stated that it was not influenced by any alleged fraud; therefore, Brian's argument must fail.

## V. Motion to Disqualify Paula

Brian argues that the trial court erred when it denied his motion to disqualify Paula. Specifically, Brian incorporates his argument that Paula perjured herself at the dissolution

hearing and argues that she "violated her ethics [sic] responsibilities by even attempting to later appear therein as a formal attorney and representative of [Carole]." Appellant's Br. p. 24.

Notwithstanding our conclusion that there is no evidence that Paula perjured herself at the dissolution hearing, the only relevant Rule of Professional Responsibility to which Brian directs us is Rule 3.7, which provides that "[a] lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness." The threshold question under Rule 3.7 is whether Paula was a necessary witness. Knowledge A-Z, Inc. v. Sentry Ins., 857 N.E.2d 411, 418 (Ind. Ct. App. 2006). "A necessary witness is not the same thing as the 'best' witness." Id. If the evidence that would be offered by having an opposing attorney testify can be elicited through other means, then the attorney is not a necessary witness. "In addition, of course, if the testimony is not relevant or is only marginally relevant, it certainly is not necessary." Id.

We first note that Paula did not represent Carole at the dissolution hearing and did not enter an appearance until August 15, 2006—more than one month after the trial court had issued its final dissolution decree. Furthermore, while we are unable to analyze Paula's testimony at the dissolution hearing, the trial court's comment that "the Court's ruling would be identical" if Paula had not testified leads us to conclude that she was not a necessary witness pursuant to Rule 3.7. Appellant's App. p. 83. Therefore, the trial court did not err when it denied Brian's motion to disqualify Paula.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and CRONE, J., concur.